Dravo Corporation, Engineering Works Division *and* Robert L. Taylor. Case 6-CA-12988

April 6, 1981

DECISION AND ORDER

On September 10, 1980, Administrative Law Judge Thomas R. Wilks issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings, and conclusions of the Administrative Law Judge and to adopt his recommended Order.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the Respondent, Dravo Corporation, Engineering Works Division, Neville Island, Pennsylvania, its officers, agents, successors, and assigns, shall take the action set forth in said recommended Order, except that the attached notice is substituted for that of the Administrative Law Judge.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

WE WILL NOT discourage activities in or on behalf of Industrial Union of Marine and Shipbuilding Workers, Local 61, AFL-CIO, or any other labor organization, by discriminatorily refusing to assign to employees light-duty jobs or any jobs which they can physically perform or otherwise discriminate against our employees in any manner with regard to their rates of pay, wages, hours of employment, hire, or tenure of employment, or any term or condition of employment.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them under the Act.

WE WILL offer to Robert L. Taylor a light-duty job or a job which he is physically able to perform and make him whole for any loss of earnings he may have suffered by reason of our discrimination against him, with interest.

DRAVO CORPORATION, ENGINEERING WORKS DIVISION

DECISION

STATEMENT OF THE CASE

THOMAS R. WILKS, Administrative Law Judge: This case was heard before me on June 6, 1980, at Pittsburgh, Pennsylvania, pursuant to a complaint and notice of hearing issued by the Regional Director of Region 6. The complaint alleges that Dravo Corporation, Engineering Works Division (herein called the Respondent), has since June 12, 1979, and in September or October 1979, refused to assign its employee Robert L. Taylor to a light-duty job or to a job that he was physically able to perform because of Taylor's activities on behalf of the Industrial Union of Marine and Shipbuilding Workers, Local 61, AFL-CIO (herein called the Union), and thus violated Section 8(a)(1) and (3) of the Act. An answer was filed by the Respondent which denies the commission of an unfair labor practice. Briefs were filed by the General Counsel and by the Respondent on or about July 16, 1980.

Upon the basis of the entire record, my observation of the witnesses' demeanor, and briefs submitted by the parties, I make the following:

FINDINGS OF FACT

I. THE BUSINESS OF THE RESPONDENT

The Respondent, a Pennsylvania corporation with a place of business located at Neville Island, Pennsylvania, is engaged in the manufacture and nonretail sale of barges and towboats. During the 12-month period ending December 1, 1979, the Respondent in the course of its operations purchased and received goods and materials valued in excess of $50,000 directly from points outside the Commonwealth of Pennsylvania for use at its Neville Island facility.

It is admitted and I find that the Respondent is and has been at all material times herein an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. LABOR ORGANIZATION

It is admitted and I find that the Union is and has been at all material times a labor organization within the meaning of Section 2(5) of the Act.

III. THE UNFAIR LABOR PRACTICES

The Respondent employs about 1,400 bargaining unit employees who are represented by the Union under a bargaining relationship that has existed for several decades. Within its various departments, the Respondent maintains a "structural shop," to which are assigned about 350 employees who are engaged in such tasks as welding, tacking, and fitting in the construction of

barges. Robert Taylor had been actively employed in the structural shop in the job classification of "hook on," until he sustained a knee injury on April 30, 1976, which was complicated by phlebitis. Thereafter Taylor received workers compensation benefits until late summer of 1979, at which time the workers compensation insurance carrier challenged the disabling nature of his condition.

The union leadership maintains about 60 officers including a president, one vice president, four grievance cmmmitteemen, one grievance committee chairman, and about 25 stewards. Throughout his active employment, Taylor served in various leadership functions for the Union. From 1970 to 1974, he served as grievance man for the structural shop. From 1970 to 1972 and from 1972 to 1974 he was the grievance committee chairman. As a grievance comitteeman Taylor processed grievances before the Respondent's department superintendent. He processed an average of five to seven grievances monthly. As committee chairman he processed all grievances from the third step of the contractual grievance procedure through to final disposition. At the third step he processed grievances to the Respondent's industrial relations department of which the manager was Henry R. Brown. At that level he processed 10 to 20 grievances. Additionally, Taylor served with two other union officers on a committee which determined which grievances were to proceed to arbitration. Approximately 10–15 grievances proceeded to arbitration monthly.

From 1975 to April 30, 1976, Taylor was the Union's vice president. During that time he served on various committees, one of which was the safety committee. As a safety committeeman, he investigated employee safety complaints during and after his work shift. During evening hours he made investigative visits to the plant in the company of a security guard.[1] Taylor filed five complaints with the Occupational Safety and Health Administration (OSHA). He accompanied OSHA agents during 10 plant inspections and he participated in meetings between those agents and Respondent's representatives. At those meetings the safety hazards were discussed and the Respondent's agents were asked for explanations as to why certain conditions had not been rectified. In reference to those OSHA inspections, it is Taylor's uncontradicted and therefore credited testimony that Manufacturing Manager Peter Kurlick complained to Taylor that the OSHA inspections were "going to put him out of business" and said "it didn't look good for business, OSHA always coming down to Dravo."[2]

The collective-bargaining agreement permits union officials to engage in union business during their working hours. Taylor spent more time away in union business than did any other union representative, except the union president who elected to take a leave of absence. Taylor was absent from his work duties and engaged in union business 50 percent of his working hours. In prior years, certain jobs were not assigned to him because of his frequent engagement in union business. Taylor's own testimony is unchallenged that unlike other grievance committeemen he became more involved in processing grievances in that, for example, he spent considerable time investigating grievances. Industrial Relations Manager Brown conceded that the number of arbitration cases processed increased for a period of time commencing in 1972 and testified: "For a period of time we had some problems, troubles, some wildcats, and there were a higher number of grievances than either before, or let's say, in the present situation." Brown testified that he had "a lot of dealings" with Taylor as a grievance comitteeman. When asked whether he considered Taylor's demeanor particularly different from that of other union officials he answered: "I wouldn't say so. He was a good dedicated union official."

There is no evidence that the Respondent has in the past systematically or individually discriminated against any union official, nor manifested any hostility to any employee because of union activities. After a wildcat strike which did not involve Taylor, pursuant to a settlement with the Union, the leaders of that work stoppage were reinstated. Union officers were accommodated with respect to the assignment of light duty or restricted work assignments. However, despite Brown's initial genial and benign characterization of Taylor as a typical "good dedicated union official," he revealed in subsequent cross-examination and redirect examination, despite protestations to the contrary, a deep-seated hostility toward the manner in which Taylor engaged in his union functions and it is evident by his own testimony that he did not consider Taylor as merely 1 of 60 union officers. At first Brown testified that Taylor "spent a good deal of time" on union business which he declined to characterize as "excessive," and which he said did not "bother" him, and that he did not "care one way or the other" and that Taylor's time spent in union business did not affect Brown's judgment of him as an employee. Yet Brown testified that he considered Taylor was "getting away with murder" with respect to the amount of time spent on union business. He admitted stating in an investigative interview that: "Taylor got away with murder because he was a union officer." On redirect examination he testified:

> Well, in my personal opinion, I will say this, as I said earlier, Bob [Taylor] did a good job as a union official. I've said it before and, I'll say it now. It just [sic]—too damn much time doing it, and it was common knowledge, not only by me, but by other people. One, supervision; two, people that saw him; and three, I'm sure, the members who he represented because it was common knowledge . . . he was never in the plant . . . . He spent an awful lot of time standing around my office, out in the halls, down the road, and everyplace else, and I think he left early, a number of times.

When asked "did this have anything to do with his union business as such," Brown answered without explanation and simply replied: "Indeterminate."

[1] Other safety committee members were accompanied by a guard. I do not conclude, without more, that the mere assignment of a plant guard escort is evidence of disparate treatment of Taylor, or hostility to him.

[2] Kurlick's managerial status is not alleged in the complaint but as the plant manager and the official who represented Respondent in the OSHA confrontations, and in safety confrontations with the Union, his agency status is clear.

Brown's demeanor when testifying as to the foregoing reference to the time spent by Taylor in union business, manifested a stridency, scorn, and contempt of uncommon dimensions.

Taylor was never reprimanded for spending excessive time on union business. There is no evidence that he was ever criticized for abusing his contractual privileges, nor is there any evidence that he was informed by any Respondent representative that he was improperly utilizing his worktime. Brown gave no further explanation for his conclusions. No evidence was submitted to demonstrate that Taylor soldiered when he engaged in union duties, or at any other time, save for the generalized testimony that he was not "aggressive" in his attitude toward his work. I therefore must conclude that Taylor became the object of Brown's enmity because he availed himself of his contractual privilege to engage in union business during working hours to a degree which Brown considered was excessive but which was not shown to be abusive or unnecessary. Thus Taylor engaged in union business as did other union representatives, but he did so to a greater extent. Brown's testimony thus corroborates Taylor's self-characterization that he was more thorough and more investigative in processing grievances than any other union representative. Clearly he aroused the wrath of Brown by engaging in union duties to such an extent, as he had displeased the plant manager by filing OSHA complaints.

On April 30, 1976, while engaged in work duties, Taylor sustained a knee injury. Thereafter he submitted to surgery. He was also treated for phlebitis. He experienced at least two periods of hospitalization, and remained under the care of his personal physician, Dr. Ronald G. Mehock, whose periodic reports kept the Respondent informed of his condition. Taylor received workers compensation benefits. In late 1977 Brown was advised that because of the threat of embolism Taylor could not return to any job involving kneeling, squatting, or climbing. Respondent was informed by Dr. Mehock that Taylor's return to his old job was not foreseeable. By the middle of 1978 Taylor did not return to his job. At that time he made arrangements with Brown whereby he was permitted to retain his seniority and other benefits in the event he found rehabilitative employment with another employer. Taylor conceded that other employees in similar positions had encountered difficulties in obtaining reemployment with the Respondent after having taken outside employment. Brown testified that he accommodated only one other such request. By January 1979, Taylor was still unemployed. Respondent's answer avers, *inter alia*, "Mr. Taylor has been allegedly disabled since 1976. He has recurrently since then requested light duty."

Light duty assignments have historically consisted of such tasks as semiclerical paperwork, and cleanup maintenance work which were initiated by the Respondent's medical department and the employees' departmental supervisor for the purpose of retaining an injured or sick employee on active duty status despite a physical disability which precluded performance of the employee's normal work tasks. The object of such assignment was to reduce the Respondent's statistical record of time lost due to accidents or illness. The lightduty assignment was temporary and the employee was expected to return shortly to normal duties. While on light duty the employee was paid the contractual wage rate that he had been paid for performance of his regular job. Prior to 1979, no disabled employee who had been disabled to the extent that he had left active duty status was ever recalled from workers compensation or other disabled status for the purpose of performing light duty. In the jargon of the shop light duty was used to keep an injured worker from going "out the door," but not used to bring a disabled worker in "off the street."

Restricted duty consisted of placing a disabled worker on a job within his classification but restricting his functions to conform to medical requirements. This also was initiated by management.[3] The Respondent also assigned injured or ill employees to other classifications to perform duties, which unlike their regular job, could be performed within the framework of their medical restrictions. Movement to such jobs was dependent on their seniority status. Brown testified that such assignment was not considered to constitute restricted duty. In any event like light duty, and restricted duty, such arrangements depended on the availability of such work and the manageability of execution. The Respondent retained complete control and discretion with respect to light duty and restricted duty. Transfer to another job for medical reasons is discretionary but subject to seniority factors. The employee has no contractual right to light duty or restricted duty. According to Brown the Respondent initiated the assignment, not the employee, and in those cases where the employee had refused light duty or restricted work they were denied workers compensation benefits.

Brown testified that the number of employees engaged in light duty at any one time ranged from 10–20 employees. He testified that only 20–25 percent of employees who "wanted" light duty were able to be accommodated by what was available, and that the same percentages applied to restricted duty depending upon the job classification; i.e., the criteria is: "What can the employee do and what is available." Brown did not explain how the employees' "wants" are relevant, in view of his testimony that it is management's judgment to initiate the assignment, and that the loss of workers compensation follows a refusal of such assignment.

Respondent's workers compensation claims manager, James Dorrance, testified that during the first half of 1979 there were approximately 75 to 80 employees away from active duty because of disabling injuries or illness. He further testified that of 75 disabled workers absent from duty only 20 to 25 were able to perform light duty, if it was available. Although Brown's estimates seem somewhat inflated in light of Dorrance's testimony, it does appear that there were more candidates or prospects for light-duty assignment than there were such positions. Since light duty was assigned to prevent a worker from "going out the door," the positions were filled leaving relatively little available for those "out the

[3] At some time prior to the hearing the Respondent eliminated all light duty work for stated economic reasons. It still maintains restricted duty.

door." The situation with respect to restricted-duty potential is not quite as clear, although Brown's testimony remained unchallenged.

Taylor testified that on several occasions prior to June 12, 1979 (the commencement of the 6-month 10(b) period proceding the charge filing) he personally requested that Brown reemploy him in active duty in light duty assignments or in any job that he could perform given his restrictions. Taylor conceded that he did not explicitly ask for restricted duty in the hook classification. Brown testified that he had suggested that Taylor take restricted duty within his old classification of hook on. Structural Shop Superintendent Toby Croyle testified that he was questioned by Respondent's medical department, probably in 1979, several times as to whether he had restricted duty available for Taylor and that he responded affirmatively assuming that the restrictions apply to kneeling, squatting, bending, climbing, and assuming that all other functions are normal. Croyle testified that such positions are still available to Taylor. Brown testified that when he offered Taylor restricted hook-on duty, Taylor merely responded that he would "think about it," but that he never agreed to take such work. Taylor testified that Brown never offered him restricted duty within his old classification. I credit Taylor. He was the far more certain witness. Furthermore, it was not Respondent's policy to permit employees to decline restricted duty and yet retain workers compensation benefits, which Taylor retained until August 1979 when they were terminated for other reasons.

Taylor testified without contradiction and credibly that in January 1979 he engaged in a conversation with Brown wherein Brown told him that the Respondent was considering instituting a new position, that of toolroom attendant and that would be the "best place" for Taylor. However, Taylor heard nothing further about that job. Union Officer Wes Boyko testified that in January 1979 he engaged in a conversation with Brown after Boyko had noticed a posting for a new position of toolroom attendant. Boyko testified credibly and without contradiction that he asked Brown whether the toolroom attendant job could be assigned to Taylor, and that Brown responded: "Wes, let me put it this way, the higher ups don't want Bob back, that's it." Despite the significance of such a statement Brown could not recall the conversation. I credit Boyko. A new employee was hired for that job in March and others also subsequent to June 12, 1979.

In early 1979, Brown suggested that Taylor return to his old job without restriction. Taylor refused. Respondent's own medical department consistently agreed with Dr. Mehock's evaluation that restrictions were essential. Brown was aware of the opinions of his own medical department. Indeed, Respondent takes the position that Taylor's condition according to the medical reports was static; i.e., there was no foreseeable recovery date. Clearly Brown must have expected a rejection of such an offer. During early 1979, Brown offered the job of bending machine operator to Taylor but without restrictions. Taylor refused inasmuch as that job fell within the same classification of hook on and entailed bending, climbing, pushing, and extended walking functions. Although there has been some modification of that job by the augmented use of cranes to assist the worker at an unspecified date subsequent to Taylor's injury, Taylor's testimonial description of the job as it existed when he worked there and as he understood it existed in early 1979 is not contradicted. Nor is Taylor's description of the hook-on job effectively contradicted with respect to the necessity to perform functions medically restricted. Under these circumstances, it is unreasonable that Brown should have expected Taylor to accept the bending machine job without restrictions. Thus, it was an offer made with the certainty that it would be rejected.

In January 1979, the Respondent instituted a canteen operation which the union had been requesting for some years. The Respondent decided that it could accommodate the Union's request and simultaneously create more lightduty assignments. Gradually four canteens were put into service and were used for light duty until April 1980 at which time they commenced being staffed by cafeteria employees for purported economic reasons and because, according to Brown, of occasions of abuse. Between 30 to 40 employees were utilized over the entire period of that light duty canteen program. Brown testified that several employees were utilized when only one was needed at one post, and thus it became overstaffed. It would appear that at any one time there were 8 to 12 employees assigned light duty at the four canteens.

In September or October of 1979 Taylor engaged in a conversation with Brown in his plant office concerning an assignment to a canteen job. Brown recalled that in the fall Taylor did engage him in such a conversation but he could not recall what was said but that he gave a negative response. Taylor testified credibly and without contradiction that, when he asked for the canteen assignment, Brown got up, closed the office door, and said:

> [D]amn it Bob, to be truthful about the thing I'd like to see you come back, but my hands are tied, there's somebody higher than me that doesn't want you back.

Taylor responded as follows: "Hank, that's no way of looking at it. I was elected to do a job and I did it." Brown answered:

> I understand, I know there was times you were pressured into doing things that maybe you didn't want to do, but that's it.

Taylor said "OK" and left. Thus Brown confirmed Taylor's accusation that he was denied reemployment to a job that he could perform because of his engagement in union activity.

Taylor testified that the following job classifications involve little or no physical functions that conflict with his medical restrictions: timekeeper, janitor, and checker adjustor. Brown conceded that subsequent to June 12, 1979, new employees were hired for all of those positions. Brown testified that the janitor's duties involve a great deal of walking, mopping, snow shoveling and furniture moving and that Taylor's restrictions precluded him from such duties. As to the timekeeper's job he

merely testified that it was not classified as a "light duty" job. He was silent as to the checker adjustor job.

Brown testified that although he could not recall what was said, he did have a conversation with Taylor wherein Taylor requested the toolroom attendant assignment upon becoming aware of the new job opening. Brown testified that he thereafter discussed the possibility of assigning Taylor to this job with the toolroom supervisors but was told that they would not accept Taylor because: "They felt he was not the type of individual they wanted in that job, due to the fact that there was a good deal of valuable equipment [and] they did not feel he was the employee they would choose to put in there." Brown testified that the second reason Taylor was deemed unsatisfactory for the toolroom attendant job was that his medical restrictions would interfere with his ability to lift and place onto the storage shelves machinery of weights up to 100 pounds. Brown did not explain why he had previously offered to reemploy Brown on a trial basis to the hook-on job without restriction, and to the bending machine job without restriction, and yet not reemploy Taylor on a trial basis as a toolroom attendant.

In further direct examination Brown testified that Taylor did not follow contractual procedure in bidding for the toolroom job or other jobs in that he did not reduce his request to a written form. In cross-examination he testified that it would have been remiss of him to place an employee on the basis of an oral request. Brown did not explain why he had acted on Taylor's oral request for the toolroom job in the first place. His initial testimony suggests that he entertained Taylor's reemployment request and that it was turned down for the foregoing reasons advanced by the toolroom supervisors. The reference to the procedural matter, I conclude, was a mere afterthought.

On cross-examination Brown testified that in March he hired a new employee of moderate height and normal female physique as a toolroom attendant. He also expanded on the reasons why he did not reemploy Taylor as a toolroom attendant or in other classifications. He testified that Taylor inquired about several jobs but that he had never made a "full attempt" to return to work. He explained that Taylor had never returned "to get evaluated to see what the heck he could do." There was no explanation of just what more was expected of Taylor, or what more than medical reports were required. Indeed, as noted above, Taylor was not even offered the toolroom job on a trial basis. On cross-examination Brown conceded that Taylor had not engaged in thievery but asserted without explanation that Taylor was not "honest" in personal dealings with Brown. Other than pursuing his union duties, there is no evidence that Taylor had other dealings with Brown. However, Brown quickly abandoned the dishonesty accusation and asserted that Taylor's "work ethic" was "not very good," and that he was not known by supervisors as a "good hard worker." Brown asserted that the possession of a good work ethic has a "great deal to do" with employee placement, and that Taylor's deficiency in that regard was one reason for his prior reemployment in the toolroom attendant job or other classification.

Structural Shop Superintendent Toby Croyle testified that Taylor was below average with respect to "aggressiveness," and that the jobs involved were "incentive" jobs; i.e., pay was geared to productivity. However, Croyle admitted that he was not Taylor's immediate supervisor when Taylor worked as hook-on in the structural shop and he did not regularly assign work to Taylor. Croyle made no reference to thievery or dishonesty. The toolroom supervisors did not testify. As stated above, Taylor had not been reprimanded since 1968. There was no evidence submitted that he was ever reprimanded or ever criticized for low productivity, or ever accused of dishonesty. Taylor testified on rebuttal, without contradiction, that his average weekly incentive bonus exceeded the average incentive bonus of other hook-on employees. I conclude that there is no evidentiary basis for Brown's generalized characterization concerning Taylor's work ethic or personal honesty.

With respect to the failure to reemploy Taylor in light duty assignments, Brown's testimony and Dorrance's testimony that prior to the canteen program it was Respondent's policy not to recall disabled workers is unchallenged. However, when the canteen operation started, certain exceptions were made and three disabled workers were recalled: Anderson, Edwards, and Owens. Brown testified that Taylor was not considered for recall to the canteen because his medical condition was static, i.e., there was no prognosis of improvement in the absence of additional surgery which was not contemplated at the time by Taylor. Brown testified that Anderson, Edwards, and Owens were recalled on the request of Dorrance and the medical department because of their opinion that these individuals had made medical progress and a return to light duty would accelerate rehabilitation to their regular duties. Dorrance gave a different explanation.

Dorrance testified that since 1976 he has served as the intermediary between Respondent's medical department, the workers compensation insurance carrier, and the job department superintendent with respect to formulation of a decision to assign restricted or light duty to disabled employees. He testified that he decided that Anderson, Edwards, and Owens were candidates for the canteen program after he had reviewed their medical records. Thus he initiated their assigmments to light duty. They did not. Unlike Anderson, Edwards, and Croyle, Taylor requested of Brown such assignment.

Dorrance testified that he did not consider Taylor because no one had requested him to, and because he was aware of Taylor's medical restrictions which appeared to be permanent. Dorrance testified that he had contemplated that the canteen assignment would be of short duration and that it would be closely monitored to prevent malingering. He testified in direct examination that Anderson's medical reports revealed that he had injured his back in 1978, was hospitalized and treated by an orthopedic surgeon who had concluded that little more could be done for him medically. He testified that Edwards and Owens had also sustained back injuries. Owens submitted to surgery twice. On cross-examination Dorrance testified that Anderson had come to his attention as a result

of an examination of his medical report. After he reviewed that report he attempted to obtain restricted duty for Anderson but none was available in his old department. He then decided to use him in the canteen. Dorrance testified again in general terms that his reading of Edwards' and Owens' medical reports indicated that it would be worthwhile to attempt their rehabilitation in the canteen. He testified that he first attempted to obtain a foreman's job for Owens, or a job in another classification but none was available. Apparently he ignored the bidding procedures. Upon further cross-examination Dorrance testified that it was his opinion that Anderson's medical reports did not contain enough substantiation of disability to prevent his return to his regular job. He then testified that he also doubted the claimed extent of Edwards' disability. Finally he testified that both Anderson's and Edwards' files indicated little if any disability. Accordingly he advised them that they would be closely monitored in the canteen job. However, with respect to Owens he testified that the medical reports revealed that Owens would never be able to return to his regular job and that permanent arrangements had to be made to provide Owens with a sedentary position. Dorrance testified that he discussed Owens' lightduty assignment with Brown because of that very medical report. Apparently Dorrance did not doubt those reports, as he attempted to find permanent work in other classifications for Owens. Inexplicably, however, Dorrance decided to recall Owens to the canteen job. He made no effort to distinguish the permanence of Owens' injury from the permanence of Taylor's disability.[4] Thus Dorrance sought light duty and restricted duty assignments for three disabled workers who did not request such assignment, on the grounds that he doubted the validity of the medical reports of two of them, but for no understandable reason for the third.

Despite Dorrance's intent to employ all canteen workers on a short-term closely monitored basis, Anderson was utilized there for 9 or 10 months and Edwards for 4 or 6 months until the program ended. Owens worked in the canteen job for 2 months until the program ceased. Owens was returned to disabled status. Eventually, Anderson returned to his old job with restrictions. Edwards' ultimate position is not clear.

Brown was involved in the institution of the canteen program. Brown testified that Dorrance was accommodated as to Edwards, Anderson, and Owens. Dorrance testified that he discussed Owens' static condition with Brown. Dorrance testified that he doubted the medical reports of Edwards and Anderson. Brown testified those disabled employees who were recalled because of Dorrance's recommendations were recalled because all of them were in nonstatic medical status and had shown signs of progress. Brown was silent as to Owens' static condition and silent as to any suspicion of malingering. Clearly, however, Brown made no suggestion to Dorrance that he also consider utilizing Taylor who had requested light duty. Thus the testimony of Brown and Dorrance is mutually inconsistent, internally inconsistent, in part contradictory, and in part inexplicable.

[4] He did not testify that he doubted the medical reports of Taylor. It was not until August 1979 that he was notified that a physician employed by the insurance carrier concluded that Taylor was able to return to normal duties. However, Respondent's own medical department concurred in the opinion of Dr. Mehock that Taylor was indeed disabled. Brown testified that in light of the medical disagreement, he took no steps to discharge Taylor for failure to report to his normal duties, although the workers compensation benefits ceased in August.

Conclusions

Respondent contends that the Charging Party is not entitled to preferential treatment because of his status of a union officer. Respondent argues that there is no demonstration of antiunion bias, and that Taylor was not denied re-employment on light duty or other duty of a restricted nature because of his union activities. It submits that Taylor was treated like most other disabled workers and that no exception was made to provide him with light or restricted duty because of the limited amount of such work available and because of the static nature of his condition. The Respondent appears to abandon the position set forth in its answer that Taylor was not actually disabled inasmuch as the record evidence reveals that the Respondent at no time rejected the conclusion of its own medical experts that Taylor was indeed disabled.

The General Counsel argues that preferential treatment is not sought for the Charging Party, but rather contends that Taylor was denied light duty or other work which he could have performed because of his union activities. The General Counsel concedes that the evidence reveals no hostility of the Respondent against union activities in general. Indeed the record fully supports the Respondent's contention that many union officers were among those disabled workers who had over the years received lightduty or restricted duty assignments. However, the General Counsel argues that Taylor was discriminated against because of his individual efforts as a union officer and that he was denied the aforedescribed work, in whole or in part, because of those efforts.

The foregoing findings of fact establish that Taylor had been engaged in union activities to such an extent that it necessitated his absence from his work station for half his working time. He was dedicated and thorough in the execution of those duties. Under the collective-bargaining agreement, and by practice, union officers were permitted to engage in union duties during working hours. Because of the frequency of his departures from his duty station, Taylor was not assigned certain job functions. The credited and uncontradicted evidence establishes that the industrial relations manager, Brown, in effect told Taylor after he had requested light duty or any work that he could perform, that the Respondent did not want to reemploy him because of the manner in which he had executed his duties of union officer. Brown's testimony revealed a pervasive and deep-seated hostility to Taylor resulting from the way Taylor conducted his union affairs, i.e., the amount of time utilized in union business. Against this background of hostility toward Taylor premised upon his individual union activities, Respondent's proffered reasons for the nonassignment of the requested work must be evaluated.

In *Shattuck Denn Mining Corporation (Iron King Branch)*, 362 F.2d 466, 470 (9th Cir. 1966), the court stated:

> Actual motive, a state of mind, being the question, it is seldom that direct evidence will be available that is not also self-serving. In such cases, the self-serving declaration is not conclusive; the trier of fact may infer motive from the total circumstances proved. Otherwise no person accused of unlawful motive who took the stand and testified to a lawful motive could be brought to book. Nor is the trier of fact—here the trial examiner—required to be any more naif than is a judge. If he finds that the stated motive for a discharge is false, he certainly can infer that there is another motive. More than that, he can infer that the motive is one that the employer desires to conceal—an unlawful motive—at least where, as in this case, the surrounding facts tend to reinforce that inference.

In the instant case, the Respondent proffered testimony as to the reasons for the nonassignment of light, restricted, or other duty Taylor was able to perform, which was inconsistent and in part contradictory. The reasons advanced, particularly by Brown in his testimony, shifted from nonavailability of work to objections to Taylor's honesty, then to objections to his work ethic and thence to objections to the failure to follow ministerial bidding procedures. The reasons advanced for the selection of other disabled employees, who did not seek such work, and the nonselection of Taylor, who explicitly requested it, shifted from the contention that their physical condition evidenced a prognosis of foreseeable recovery, to a contention that they were malingerers, to an apparent contention that one of them, Owens, was selected not only as a candidate for indefinite light duty but as a candidate for other permanent work he could perform inasmuch as he possessed a hopelessly static disability which required a completely sedentary position. At one point it was testified that no light or restricted duty or other duties were assigned to Taylor because he had not requested it nor had followed bidding procedures. At another point, it was testified that the Respondent takes the initiative in the assignment of such work and not the employee, as indeed Dorrance took the initiative with respect to the possibility of placing Owens in other classifications or in restricted duty, or ultimately in light duty. At one point it was explained that the canteen assignments were intended to be temporary, of short duration, closely monitored, and a stepping stone to rehabilitation. Yet disabled employees were engaged in that work for extensive periods of time and with respect to Owens, there was no expectation of rehabilitation. It was contended that no work was available for Taylor to perform. However, there was restricted duty available to him as a hook on, which I found above, was not offered to him. Also as noted above new employees were hired into classifications for which Taylor could have been utilized, at the very least on a trial basis.

I conclude that the reasons advanced by the Respondent for the nonselection of Taylor for light, restricted, or other duty he could perform was false and pretextuous. I infer that the true and only motivation that guided Respondent was its hostility to Taylor's performance of his union duties. I reject the Respondent's argument that, assuming an unlawful motivation, a lawful motivation coexisted, and that it cannot be concluded that but for Taylor's protected activity he would have been assigned the requested work. I have found Respondent's proffered motivations false and pretextuous. Accordingly, I do not construe this to be a fixed motivation case as was considered by the court in *Coletti's Furniture, Inc.*, 550 F.2d 1292 (1st Cir. 1977), and upon which case Respondent relies. Cf. *Howard Johnson Company*, 242 NLRB 386 (1979).

The Respondent argues that a motivation based on a hostility to Taylor's abusive performance of his union duties is not an unlawful motivation. However, there is nothing in this record upon which I can conclude that Taylor's use of time was in fact abusive or unjustified, except for Brown's unfounded characterizations. Whatever probative value Brown's subjective and conclusionary testimony might have had was totally negated by his lack of credibility as a witness. Assuming that the Respondent entertained a good-faith belief that Taylor had engaged in his union duties in an abusive manner (an assumption that is impossible in light of Brown's lack of candor as a witness), such a good-faith but erroneous belief does not render lawful discriminatory conduct premised thereon. In *N.L.R.B.* v. *Burnup & Sims, Inc.*, 379 U.S. 21, 23 (1964), the Court held:

> In sum, §8(a)(1) is violated if it is shown that the discharged employee was at the time engaged in a protected activity, that the employer knew it was such, that the basis of the discharge was an alleged act of misconduct in the course of that activity, and that the employee was not, in fact, guilty of that misconduct.

The *Burnup* rule has been applied in varying contexts. See, e.g., *Allied Industrial Workers, Local No. 289* v. *N.L.R.B.*, 476 F.2d 868, 878–880 (D.C. Cir. 1973) (strike activity); *N.L.R.B.* v. *Clinton Packing Co., Inc.*, 468 F.2d 953, 954–955 (8th Cir. 1972) (mistaken belief of slowdown while employees were engaged in union activities); *Kayser-Roth Hosiery Company, Inc.* v. *N.L.R.B.*, 447 F.2d 396, 400 (6th Cir. 1971) (picket line conduct); *N.L.R.B.* v. *Orleans Mfg. Co.*, 412 F.2d 94, 98 (2d Cir. 1969) (union soliciting); *Shattuck Denn Mining Corp., supra* (strike activity).

I conclude that the Respondent did not demonstrate a good-faith belief that Taylor had engaged in misconduct in the performance of his union duties. I conclude that the Respondent on and after June 12, 1979, refused to assign Taylor to light duty or other work which he was capable of performing because of his past vigorous and extensive engagement in union activities and therefore violated Section 8(a)(3) and (1) of the Act.[5]

[5] Inasmuch as such conduct occurred within 6 months of the filing of the charge, I do not find the matter barred by Sec. 10(b) of the Act as

Continued

CONCLUSIONS OF LAW

1. The Respondent is engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. The Respondent has violated Section 8(a)(3) and (1) of the Act on or about June 12, 1979, and thereafter by refusing to assign its employee Robert L. Taylor to a light duty job or to a job he physically could perform because of his activities as an officer of the Union on behalf of the Union in order to discourage employees from engaging in similar activities.

4. The aforesaid unfair labor practice affects commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that the Respondent engaged in an unfair labor practice, I recommend that it be required to cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

It having been found that the Respondent discriminatorily refused to assign Robert L. Taylor to a lightduty job or to a job he physically could perform, in violation of Section 8(a)(3) and (1) of the Act, I shall recommend that Respondent be ordered to offer him light duty work or work he can physically perform and make him whole for any loss of earnings suffered by reason of the discrimination against him as found herein with interest thereon to be computed in the manner prescribed in *F. W. Woolworth Company*, 90 NLRB 289 (1950), and *Florida Steel Corporation*, 231 NLRB 651 (1977).[6]

Upon the basis of the entire record, the findings of fact and conclusions of law and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

ORDER[7]

The Respondent, Dravo Corporation, Engineering Works Division, Neville Island, Pennsylvania, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Discouraging activities in or on behalf of Industrial Union of Marine and Shipbuilding Workers, Local 61, AFL-CIO, or any other labor organization, by discriminatorily refusing to assign light duty jobs or any other jobs which they can physically perform or otherwise discriminating against them in any manner with regard to their rates of pay, wages, hours of employment, hire, or tenure of employment, or any term or condition of their employment.

(b) In any like or related manner interfering with, restraining or coercing employees in the exercise of rights guaranteed them under Section 7 of the Act.

2. Take the following affirmative action which is necessary to effectuate the policies of the Act:

(a) Offer to Robert L. Taylor a light duty job or a job which he is physically able to perform and make him whole for any loss of earnings he may have suffered by reason of Respondent's discrimination against him, in the manner set forth in the section of this Decision entitled "The Remedy."

(b) Upon request, make available to the Board or its agents, for examination and copying, all payroll and other records necessary to a determination of the backpay due under the terms of this Order.

(c) Post at its Neville Island, Pennsylvania, place of business copies of the attached notice marked "Appendix."[8] Copies of said notice, on forms provided by the Regional Director for Region 6, after being duly signed by Respondent's representatives, shall be posted by Respondent immediately upon receipt thereof, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to insure that notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director for Region 6, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

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averred in Respondent's answer. That defense was not raised at hearing but argued in the brief.

[6] See, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962).

[7] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

[8] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."